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The Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Ingersoll-Rand
File: B-225996
Date: May 5, 1987

DIGEST

1. Contracting agency may extend the due date for delivery of two test units by 30 days where the contract as modified is not materially different from the contract for which a competition was held. This is because the requirement that the contractor make timely delivery of the test units or risk termination of its contract remains; the delay resulted in part from the agency's inability to meet its contractual duty to provide adequate drawings; and the schedule for future deliveries is unchanged.

2. Award of a contract to refurbish pumps and motors will not be questioned, even though the agency--before award--was aware of the need to delete one motor because the solicitation inadvertently failed to include a schedule of prices for the parts needed to refurbish that motor, where the competition for the contract as subsequently modified would not be materially different from the competition originally obtained. Only one of 100 pumps and motors was deleted; the item for refurbishment of the motors was reduced by the unit price for the motor; and the awardee's overall evaluated price was \$400,000 less than that of the protester.

3. Where the record of the questions and answers at preproposal conference is furnished to all offerors in a writing signed by the contracting officer, this letter meets the essential requirements for an amendment, and the information therein is therefore binding on all offerors. Protester is not entitled to ignore this information and instead to rely on its pricing practice under other contracts.

DECISION

Ingersoll-Rand protests the modification by the Department of the Navy, Portsmouth Naval Shipyard, Portsmouth, New Hampshire, of contract No. N00102-86-C-1307 with the General Electric Company. The fixed-price contract is for

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the refurbishment and installation of main feed pumps and motors on nuclear submarines. Ingersoll-Rand primarily contends that the modifications to the contract were beyond the scope of the contract for which the competition was conducted.

We deny the protest.

Portsmouth Naval Shipyard reports that Ingersoll-Rand is the original equipment manufacturer for the main feed pumps that the shipyard manages; it previously procured refurbishment from the firm on a sole-source basis because the drawings and data necessary to compete the requirement were not available. The shipyard states that although it attempted to obtain the drawings from Ingersoll-Rand, claiming that the government had paid for them and therefore owned them, the firm refused to provide the drawings except under unacceptable conditions. The shipyard nevertheless developed a data package and undertook its first competitive procurement for refurbishment of the pumps, issuing request for proposals (RFP) No. N00102-86-R-1307 on February 21, 1986.

Under the solicitation, as amended, the shipyard solicited offers for the refurbishment and subsequent mounting, alignment and testing of 50 main feed pumps and 50 main feed pump motors. Since only Ingersoll-Rand had previously refurbished the pumps and since timely performance was considered necessary to support the nuclear submarine fleet, the shipyard viewed the first pumps and motors as "test units" for demonstrating the ability of the contractor to perform on a timely basis. Accordingly, the solicitation as issued required delivery of the first two refurbished pumps and first two refurbished motors within 90 days of receipt by the contractor. It further provided that:

"The remaining units on the contract will not be shipped to the contractor's plant until the first pumps have been completed and accepted by the government. Failure to satisfactorily complete the first units will result in termination of the remainder of the contract."

In response to a concern expressed at the preproposal conference that the 90-day delivery requirement was insufficient because of the lead time required for some material, the Navy amended the solicitation to extend the period to 135 days.

The solicitation required offerors to submit a fixed-price for the refurbishment of each pump and motor (items No. 1 and 2)--including disassembly, cleaning, inspection, parts

replacement, reassembly, and testing--and the subsequent installation of each refurbished unit (item No. 3). In addition, offerors were required to submit prices for definite quantities of planned replacement parts and contingency replacement parts under items for the "Unplanned Replacement Parts/Repairs For Main Feed Pumps," as well as for certain unplanned repairs to the motors.

The solicitation as issued provided that award would be made to the technically acceptable offeror submitting the low price for items No. 1, 2, and 3. However, at the preproposal conference, the Navy advised offerors that evaluation would be based not only on proposed prices for the refurbishment and installation of the pumps and motors (items Nos. 1, 2, and 3), but also on "the price of planned parts plus a factored price for unplanned parts." The total price for unplanned parts was derived by application of a percentage-of-use factor to the price quoted for each part.

The Navy received four proposals in response to the solicitation. It found that General Electric offered the low evaluated price of \$1,227,533.37, followed by Dresser Industries at \$1,480,541.60, Ingersoll-Rand at \$1,646,417.56, and a fourth offeror at \$1,900,617.05. The shipyard found General Electric's proposal to be technically acceptable and, after a favorable preaward survey, made award to that firm on August 5, 1986.

Sometime before award, however, the shipyard had discovered that the first two motors were of different types and that the parts list in the proposed contract included parts for only one of them. Accordingly, on July 31, contracting officials recommended that the motor for which there was no priced parts list be deleted. Rather than solicit prices on a sole-source basis from General Electric, on September 19 the contracting officer executed the protested modification, deleting one motor and reducing the price for that item by \$3,965, the unit price for refurbishing one motor.

A second modification, also protested by Ingersoll-Rand, involved the "detail pump drawings necessary to accomplish the refurbishment" of the units. Although the solicitation and subsequent contract required the Navy to furnish the drawings, those available to the Navy lacked some of the necessary dimensions. The shipyard therefore loaned General Electric two Ingersoll-Rand suction impellers, used to draw water into the pumps, for purposes of replication. On September 5, however, General Electric notified contracting officials that the subcontractor it had chosen to manufacture the impeller, concerned that it might infringe on Ingersoll-Rand's patent rights, was unwilling to trace a sample impeller without government authorization. General

Electric explained that it believed that Ingersoll-Rand may have advised the subcontractor of potential legal problems if it traced the impeller.

On September 8, the contracting officer confirmed that the impeller drawing and sample impeller could be used to fabricate new impellers. Nevertheless, General Electric subsequently requested an extension in the required delivery date for the first two pumps of 30 days, due to the delay resulting from the subcontractor's initial fear of potential legal problems and the possibility that additional work on the dies for the impellers might be required. General Electric assured the Navy, however, that once the patterns were developed for the first impellers, additional ones could be manufactured without adverse impact on delivery dates. On December 5, the contracting officer modified the contract to extend the delivery date for the first two pumps by 30 days, from December 20 to January 19, and to reduce the price for the units by a total of \$200.1/

On December 22, Ingersoll-Rand submitted a Freedom of Information Act (FOIA) request for information concerning -- the contract with General Electric. That same day, during a meeting with contracting officials, Ingersoll-Rand was advised of the extension of the delivery date for the first two pumps. The firm responded by filing this protest with our Office on January 2.

Ingersoll-Rand generally alleges that the modifications were beyond the scope of the contract for which offers were solicited and that they converted a proposed fixed-price contract with a rigid delivery schedule into a cost-reimbursement contract with a flexible delivery schedule. In particular, in its initial protest, Ingersoll-Rand contended that General Electric's failure to meet the 135-day delivery schedule for the first two test units in the contract as awarded required--under the terms of the contract--that it be terminated as to the remaining items. The protester emphasizes that the competition was structured on meeting the 135-day requirement and claims that a 22 percent increase in available time would have had a "significant effect on the alignment of resources and cost basis of the original competition."

On January 7, in response to the FOIA request, the Navy provided Ingersoll-Rand with a number of documents relating

1/ The Navy reports that General Electric met the extended deadline for refurbishing the first two pumps and has returned the sample impeller to the Navy.

to the contract with General Electric. Based on these documents and a January 19 meeting with contracting officials, on January 27 Ingersoll-Rand filed an additional submission setting forth new bases for protest. Ingersoll-Rand alleged that other of the Navy's actions, i.e., furnishing impellers and "extra technical drawings" to General Electric and deleting one of the test motors, were beyond the scope of the contract. In addition, it noted that General Electric apparently was being separately reimbursed under the contract for labor on unplanned pump repairs. Although it admitted that "[u]nplanned labor was said to be reimbursable at the preproposal conference," Ingersoll-Rand claims that its prices for this procurement included a price for unplanned labor, since under prior contracts unplanned labor allegedly was to be included in the base price for feed pump refurbishment. The protester generally claimed that offerors' pricing would have been materially different had they known that the contract would be modified to relax the delivery requirements and reduce the risk to the contractor.

The Navy, on the other hand, maintains that the modifications are a matter of contract administration, and thus are not encompassed within our bid protest function. In any case, the agency denies that the modifications were beyond the scope of the contract.

As a general rule, our Office will not consider protests against contract modifications, as they involve matters of contract administration that are the responsibility of the contracting agency. 4 C.F.R. § 21.3(f)(1) (1986). We will, however, consider a protest that a modification is beyond the scope of the original contract. If a contract as modified is materially different from the contract for which a competition was held, the subject of the modification should have been competitively procured unless a sole-source award was appropriate. Indian and Native American Training Coalition, 64 Comp. Gen. 460 (1985), 85-1 CPD ¶ 432; King-Fisher Co., B-224341, Aug. 2, 1986, 86-2 CPD ¶ 240; cf. Inter-Continental Equipment Inc., B-224244, Feb. 5, 1987, 87-1 CPD ¶ 122.

We conclude that the current contract, as modified to extend the delivery schedule for the test units from 135 to 165 days after receipt by the contractor, is not materially different from the contract for which the competition was held. Once a contract is awarded, issues involving the waiver of requirements generally are matters of contract administration. King-Fisher Co., supra (deletion of requirements for listing by Underwriter's Laboratories or Factory Mutual Systems). There is a significant difference between those situations where a contractor is given

additional time to perform a contractual obligation and those where time is used to define the extent of an obligation. CPT Corp., B-211464, June 7, 1984, 84-1 CPD ¶ 606. For example, we have found that permitting a contractor to delay performance at one of 25 locations and for periods of less than a month at the other locations did not substantially alter the contractor's obligations, but rather was within the scope of the awarded contract. Security Systems, B-217203, Aug. 26, 1985, 85-2 CPD ¶ 229.

We find this case to be analogous. Although the original requirement to deliver the test units within 135 days was intended to test the contractor's ability to perform, the modified contract still requires that the contractor make timely delivery of the test units or face termination. The only change is that the Navy has concluded that delivery of the initial units within 165 days will adequately demonstrate the contractor's ability to perform on a timely basis.

Moreover, the delay resulted in part from the shipyard's inability to meet its contractual duty to provide adequate drawings to the contractor, and it was incurred in the course of an effort to enhance competition for services previously acquired from the protester on a sole-source basis.

We see no basis to question the shipyard's provision of technical drawings and sample impellers to General Electric and its subcontractor. As indicated above, the solicitation and subsequent contract required the Navy to furnish the "detail pump drawings necessary to accomplish the refurbishment." The sample impellers were provided to General Electric because available technical drawings were inadequate. In addition, offerors were on notice that additional material might be available, since the agency informed offerors at the preproposal conference that:

"[i]f a successful contractor wants access to the supply system for other items than those which will be furnished as Government furnished material, the contractor will have to investigate this possibility on his own."

Ingersoll-Rand further contends that the Navy should have reopened negotiations after deciding to delete one of the two motors, since, according to the protester, it was significantly easier to deliver one motor and two pumps during the test period than it would have been to deliver the two motors and two pumps upon which the competition was based. The protester argues that "[b]ased on the different positions of the competitors there might well have been a

different outcome if the bidding had not involved that motor."

If the integrity of the competitive bidding system is to be maintained, agencies may not award contracts with the intention of significantly modifying them after award. Cf. Inter-Continental Equipment, Inc., supra; ManTech Field Engineering Corp., B-218542, Aug. 8, 1985, 85-2 CPD ¶ 147. If we find that the competition for the contract as modified would be materially different from the competition originally obtained, then we generally will conclude that the award was improper and recommend resolicitation under revised specifications. Id.

We find no basis to conclude that the Navy improperly failed to permit Ingersoll-Rand to compete for the reduced requirement. Only one of 100 pumps and motors was deleted, and the agency reduced the price for that item accordingly. If Ingersoll-Rand's proposed costs would have been reduced by the deletion, it is likely that the proposed costs of its competitors would also have been reduced. In any case, it is not reasonable to expect that the competitive position of Ingersoll-Rand would have improved sufficiently to offset General Electric's \$400,000 price advantage. Id.; Central Texas College System, B-215172, Feb. 7, 1985, 85-1 CPD ¶ 153.

As indicated above, Ingersoll-Rand admits that the Navy informed offerors at the preproposal conference that unplanned labor--labor on unplanned pump repairs--was reimbursable. Since the record of the questions and answers at the preproposal conference was furnished to all offerors in a writing signed by the contracting officer, this letter meets the essential requirements for an amendment, and the information therein was therefore binding on all offerors. See IBIS Corp., B-224542, Feb. 9, 1987, 87-1 CPD ¶ 136. Accordingly, Ingersoll-Rand's reliance on the alleged practice under other contracts was unreasonable. In any case, if it considered the solicitation as amended to be ambiguous, it was required to protest before the closing date for receipt of initial proposals. 4 C.F.R. § 21.2(a)(1).

Finally, Ingersoll-Rand claims that it learned from the administrative report submitted by the agency in response to this protest that the Navy considered the cost of planned and unplanned parts in determining which proposal offered the lowest cost to the government. The protester contends that this is contrary to the statement in the solicitation as issued that only items No. 1, 2, and 3 for the refurbishment and installation of the pumps and motors would be considered in the cost evaluation.

Offerors also were informed at the preproposal conference that the evaluation would include the price of planned parts plus a factored price for unplanned parts. In view of our conclusion that the letter incorporating this information met the requirements for an amendment, so that information therefore was binding on offerors, Ingersoll-Rand's allegation provides no basis for us to question the Navy's cost evaluation. In any case, General Electric's price would have been low even if the evaluation had been limited to the prices for items No. 1, 2, and 3.

The protest is denied.

for Seymour G. Van
Harry R. Van Cleve
General Counsel